1949

Etha Baker Flowers v. Wrights, Incorporated : Brief of Respondent

Utah Supreme Court

INDEX

AUTHORITIES CITED

TEXTS CITED

In the Supreme Court of the State of Utah

ETHA BAKER FLOWERS, AURA BAKER HORTON, and TULIE BAKER RANDALL,
Plaintiffs and Appellants,

vs.

WRIGHTS, INCORPORATED,
A Corporation,
Defendant and Respondent.

STATEMENT OF CASE

This case involves simply a determination of the meaning of certain language embodied in a written lease between plaintiff's predecessor (their mother) as lessor, and the defendant, as lessee. If the language means as contended for by defendant, then the defendant admittedly has paid all of the rentals owing by it, except as to the amount of $211.80, which has heretofore been tendered and refused. On the other hand, if the language means as contended by plaintiff, defendant may owe additional rentals. We use the word "may" advisedly, as there are other factors that then enter into the determination, and which will hereinafter be discussed.

The lease in question was executed by plaintiffs' mother, Allie C. Baker, as lessor, and the defendant, as lessee, on or about February 11, 1939, for a five year term commencing February 15, 1939. Defendant had occupied the premises for some time prior to the execution of this formal lease. (Tr. 10) On June 25, 1941, the term of the then existing lease was extended to February 15, 1949.

The important language of the lease, insofar as this case is concerned, is, except possibly for one matter, set out in plaintiff's brief. We here again set it out for convenience in referring to it.

At the very beginning of the lease the parties are positively identified—Allie C. Baker (plaintiffs' predecessor), as the "Lessor", and Wrights, Incorporated, as the "Lessee".

The lease then provides:

> "And said lessee, in consideration of the leasing of the premises aforesaid by said lessor to it, covenants to pay as the annual rental for said premises three (3) per cent of the *total sales volume of the lessee,* provided, however, that the lessee agrees to pay a minimum rental of Two Thousand Nine Hundred and Forty Dollars ($2,940.00) per year, payable in monthly installments * * *."
>
> "It is understood and agreed that the books of said lessee shall be open for inspection to verify the annual sales reported by it". (Italics added).

Section 3 of the lease then provides:

> "That neither the lessee nor its legal representatives will let or underlet said premises, or

assign this lease, without the written assent of the lessor first had and obtained thereto, *except that said lessee may sublet space in the said premises to departments selling other lines of merchandise than those offered for sale by the lessee, that is to say, women's coats, suits, furs and dresses".* (Italics added.)

The case involves simply the question of whether defendant has paid all of the rentals it was obligated by the lease to pay, or if it owes additional rentals.

STATEMENT OF FACTS

In addition to the lease itself, other factual matters were developed in the trial relating to the matter in issue. We state them briefly.

In what was designated a pre-trial order, the parties stipulated and agreed to certain facts, which stipulation, and facts embodied therein, was formally offered in evidence by Plaintiffs and received by the Court:

1. That the dollar volume of sales *made by the defendant from the premises* during the ten years of the lease was $1,300,926.56 (R-020).

2. That the dollar volume of sales *made and effected by the sub-lessee of the shoe department* during the ten years of the lease was $822,620.09 (R-020).

3. That the dollar volume of sales *made and effected by the sub-lessee of the millinery department* was $131,-330.73 (R-021).

4. That during the ten year term of the lease the defendant paid as rentals $40,374.64, and tendered the additional sum of $211.80, which latter amount plaintiffs refused to accept. (R-021)

5. The pre-trial order then contained the following stipulation of the parties:

> "*That except as to the facts hereinabove stipulated in paragraphs* 2, 3, 4, *and* 5, *supra*, (being the matters set out in paragraph 1, 2, 3 and 4 above) the plaintiffs and defendants each reserve, without prejudice or qualification of any kind, the right to tender, offer and give evidence on any issue * * *".

Defendant at the time of the execution of the lease was in the business of selling women's coats, suits, furs, and dresses. This appears from the lease itself. Its total sales for the period in question were $1,300,926.57. Defendant sub-let space in the premises to a sub-lessee who sold shoes, and whose total sales were $822,620.09. It also sub-let space in the premises to a sub-lessee who sold millinery, and whose total sales were $131,330.73.

Defendant paid rentals on the basis of its own sales. These payments were accepted by the plaintiffs up through the final month of the lease, but when the final percentage rentals for the period from January 1st to February 15, 1949, amounting to $211.80 were tendered, plaintiffs refused the same, and brought this action, claiming defendant should have been paying on the basis of the sales of its sub-lessees, as well as its own sales, and owed an additional $28,880.73 as percentage rentals on such sales.

On the trial, in addition to the foregoing facts, plaintiffs proved by letters from defendant to plaintiffs that on May 21, 1945, defendant paid the accrued percentage rentals on the sales of "Wrights, Inc." up

through December 31, 1944. (Exhibit D.) Similar letters accompanied the checks for the percentage rentals for the years 1945, 1946, 1947 and 1948. (Exhibits E, F, G, H, and I). In each it was made clear by defendant that the percentage rentals paid were computed *on the basis of defendant's sales only.*

Plaintiffs also offered to prove in effect that by reason of the manner in which the sales by the sub-lessees were handled they should be construed by the court to be sales by the defendant itself. This offer was refused. The basis of such refusal, and the correctness of the ruling, will be considered *infra.*

At the conclusion of plaintiffs' evidence the defendant moved for a non-suit upon the ground that plaintiffs had failed to prove that defendant owed additional rentals as claimed by plaintiffs, which motion was granted.

Plaintiffs' appeal apparently is predicated upon two propositions,

First, that under the lease defendant was obligated to pay percentage rentals on the basis of sales by its sub-lessees, as well as its own sales, and,

Second, the lower court erred in refusing plaintiffs' offer of proof as to the manner and methods of handling the sales by the sub-lessees.

We will discuss these points in reverse order.

ARGUMENT

THE LOWER COURT DID NOT ERR IN REFUSING PLAINTIFFS' OFFER OF PROOF,

(A) BECAUSE IT WAS IN DIRECT CONFLICT WITH THE STIPULATED FACTS, AND

(B) THE EVIDENCE OFFERED WAS WHOLLY IMMATERIAL.

Plaintiffs offered to prove, in effect, that by reason of the manner in which the sub-lessees conducted their operations, their sales should be construed to be sales by Wrights, Incorporated. We submit the lower court was right in refusing this offer, first, because it was in direct conflict with the stipulated facts, and, second the evidence offered was wholly immaterial.

A. THE LOWER COURT DID NOT ERR IN REFUSING PLAINTIFFS' OFFER OF PROOF, BECAUSE IT WAS IN DIRECT CONFLICT WITH THE STIPULATED FACTS.

As previously pointed out, the parties in the pretrial order stipulated and agreed as to the dollar volume of defendant's sales. Paragraph 2 of such order and stipulation recited "That without further proof or evidence *and for the purpose of this action* the volume of sales *by defendant* from the premises under lease to it" is $1,300,926.57. By Paragraph 6 it was stipulated in effect that such was accepted as the fact, *and evidence to the contrary would not be tendered or offered.* Yet plaintiffs' offer of proof went to the heart of that very stipulated fact, namely, that the sales by defendant were not $1,300,926.57, as agreed upon, but were something other and different.

The effectiveness and conclusiveness of stipulations entered into between parties to litigation regarding factual matters involved has been before the courts on many occasions. The law seems to be well settled that stipulations made by parties to a judicial proceeding,

or by their attorneys, are binding upon those who make them and those whom they lawfully represent, and also upon the trial and appellate courts. They cannot be contradicted by evidence tending to show the facts to be otherwise. This court so held in the case of *Rickenberg v. Capital Garage,* 68 Utah 30, 249 P. 121, as follows:

> "In this connection it should be stated that respondent's counsel insist that the latter was not guilty of driving the car at the time of his arrest, but assert that the same was driven by a lad about 13 years of age. *They have set forth the evidence upon that subject and it supports their contention.* We remark, a complete answer to the foregoing contention is that it was stipulated at the hearing in the court below, and the stipulation appears in the record, that the respondent was convicted of the offense of driving an automobile while intoxicated. Respondent is bound by that stipulation, and so are we."

We point out particularly that in such a case, as observed by the court, the evidence supported facts contrary to those stipulated, but this court said:

> "Respondent is bound by that stipulation, and so are we."

We recognize, of course, that in the interests of justice parties to stipulated facts do not become irrevocably bound thereby, and may, under certain conditions, withdraw therefrom, or repudiate the same. The rule with respect thereto appears to be well covered in the decision of the Supreme Court of Nebraska in the case of *Lebarron v. City of Harvard,* 262 N. W. 26, as follows:

"A stipulation by the parties as to the facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise. City of Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774; Ward & Co. v. Industrial Commission, 304 Ill. 576, 136 N. E. 796; 5 Wigmore, Evidence (2d Ed.) 605, Sec. 2590; Andrews v. Olaff, 99 Conn. 530, 122 A. 108.

Parties will not be relieved from stipulations in the absence of a clear showing that the matter stipulated is untrue, and then only if the application for such relief is seasonably made, and good cause is shown for granting it. 25 R. C. L. 1099, Sec. 6; Smith v. Smith, 90 Fla. 824, 107 Sou. 257; Muller v. Dows, 94 U. S. 277, 24 L. Ed. 76; United States v. Davidson (D. C.) 1 F. (2d) 465; Brown v. Cohn, 88 Wis. 627, 60 N. W. 826; Franklin v. National Ins. Co., 43 Mo. 491; Holley v. Young, 68 Me. 215, 28 Am. Rep. 40; Hutchings v. Buck, 32 Me. 277.

A motion addressed to the court for relief, sustained by proper proof, with due notice to opposing party, has been recognized as proper practice. Ish. v. Crane, 13 Ohio St. 574; In re Reed (D. C.) 117 F. 358. The opposing party must be given due notice of the proposed application for relief. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 690, 46 L. Ed. 968."

But even where proper application for leave to repudiate a stipulation is made, relief therefrom lies in the sound discretion of the trial court, which ordinarily will not be interfered with on appeal. 50 Am. Jur. Pg. 613.

So we say in the instant case that it having been formally stipulated that the defendant's sales were in a certain dollar amount, the proffered evidence tending to show that sales by sub-lessees were in fact defendant's sales, and thus defendant's sales were nearly a million dollars greater than as stipulated, was properly refused.

B. THE LOWER COURT DID NOT ERR IN REFUSING PLAINTIFFS' OFFER OF PROOF BECAUSE THE EVIDENCE OFFERED WAS WHOLLY IMMATERIAL.

The second reason why the proffered evidence was properly refused, is that the record discloses that such evidence, going to the manner in which the sales were handled, the relationship between defendant and the sub-lessees, employees, etc., was wholly immaterial. After plaintiffs had made their offer of evidence which they felt would tend to prove that what they had stipulated as being sub-lessees' sales were not such at all, but were actually defendant's sales, the court inquired of plaintiffs' attorney: (R17)

> "THE COURT: Let me ask this question, Mr. Riter. Suppose these lessees had operated *entirely independent,* they had no arrangement—say just for the purpose of the argument—suppose they had operated entirely independent, had their own cash register, had their own set up on everything, *would you still contend their sales came under the terms of the lease?*"

A. "Yes, I would, under the terms of the lease, quite frankly."

THE COURT: "Then with that, I'll sustain the objection to the evidence, if that is your contention."

A. "Why certainly I contend that."

THE COURT: "I'll sustain the objection."

In other words, plaintiffs made obvious their position to be that defendant was obligated to pay percentage rentals on the basis of the sub-lessees sales *as such*, and, accordingly, it became immaterial under plaintiffs' own theory, and as the court was categorically informed, as to the detail of the sub-letting, and the manner in which the operations were carried on. Plaintiffs' theory in effect was that defendant was liable on the basis of all sales made from the premises, whether its own sales, or the sales of sub-lessees. Hence, the offered evidence would not tend to establish any fact material to plaintiffs' case.

We appreciate, of course, that if plaintiffs' theory was that defendant was liable only for its own sales, evidence tending to show that all or some of what had been referred to as sub-lessees' sales, were in fact defendant's sales, might be material, except that such evidence would be in direct conflict with the stipulated facts. But plaintiffs adhered to the proposition that defendant was liable on the basis of the sub-lessees' sales as such, and the proffered evidence obviously was immaterial.

This case was presented to the lower court upon the theory that defendant was liable to plaintiff under the lease for percentage rentals based not only on its own sales, but also on sales of the sub-lessees. Those

figures were before the court, and stipulated and agreed to by the parties. With those figures before the court, and with Mr. Riter's assertion to the court that defendant was liable for the sub-lessees' sales as such, the only material question was the question of law of whether the lease, by its terms, covered, or should be construed to cover, sales by sub-lessees of lines of merchandise non-competitive with defendant's, as well as defendant's, sales. Hence, the court's rejection of the proffered evidence was not erroneous, but proper.

The proposition may, perhaps, be stated in another way. The issue, as stated by Mr. Riter, was, in effect, that defendant was liable on the basis of sub-lessees' sales, as well as it own. Thus the question of whose sales they may have been (so long as they were one or the other) was not material. Material facts are those which are essential to the case, and without which it could not be supported. Evidence, to be admissable, may be either *factum probandum,* or *factum probans,* but it must be one or the other. That is, it must tend to prove either the ultimate issue, or a subsidiary fact which itself tends to prove the ultimate issue. The proffered evidence tended to prove neither, and hence its rejection was proper.

It is elementary, of course, that where a case is tried on one theory in the court below, it may not be presented on a different theory on appeal. Here plaintiffs were asked the direct question by the court if they contended that defendant was liable on the basis of the sub-lessees' sales even if the sub-lessees operated "entirely independent" of the defendant, and their reply

to this direct question was a categorical and unequivocal affirmative. In other words, their construction of the rental provisions of the lease was that the lease by its terms covered sales by independent sub-lessees. Such being the case it is apparent that the proffered tetimony was immaterial to the issues as fixed by plaintiffs' own construction of the agreement, and they cannot now complain because the court made its evidentiary ruling in accord with plaintiffs' own construction of the agreement.

THE LOWER COURT DID NOT ERR IN GRANTING DEFENDANT'S MOTION FOR NON-SUIT, (A) BECAUSE THE LEASE BY ITS EXPRESS TERMS OBLIGATED THE DEFENDANT TO PAY ON THE BASIS OF ITS OWN SALES ONLY, AND, (B) IF THERE WAS ANY AMBIGUITY IN THE LEASE IN REGARD TO THE BASIS OF PAYMENT, THE PARTIES THEMSELVES CONSTRUED IT IN FAVOR OF THE DEFENDANT.

At the conclusion of Plaintiff's case the Defendant moved for a judgment of non-suit, which was granted. We submit this ruling was proper, (a) because the lease by its terms obligated defendant to pay percentage rentals on the basis of its own sales only, and the evidence conclusively showed that all such rentals had been paid; and, (b) because if there was any ambiguity in the lease in this regard, the parties themselves had so construed it.

A. THE LEASE BY ITS TERMS OBLIGATED THE DEFENDANT TO PAY ON THE BASIS OF ITS SALES ONLY.

Referring again to the lease itself it will be noted that the instrument first specifically defines the parties, provided that this defendant, Wright's Incorporated, is "hereinafter (in the lease) called the lessee". It then goes on

> "And said lessee * * * convenants to pay as the annual rental for said premises three (3) per cent of the total sales volume *of the lessee,* provided, however, that the lessee agrees to pay a minimum rental of Two Thousand, Nine Hundred and Forty ($2,940.00) Dollars per year * * * ." (Italics added).

We submit that language could not be plainer, phraseology could not be more specific, nor the intent of the parties more clearly expressed. The language of the written lease is that percentage rentals are to be based on the "sales volume of the lessee". But despite this clear and concise language these plaintiffs (who are not the original lessors.) contend that there is an ambiguity, and that the court should construe the language "sales volume of the lessee" to read "sales volume of the lessee, *plus the sales volumes of any sublessees*".

The parties to the lease in Paragraph 3 thereof, specifically agreed

> "That neither the lessee nor its legal representatives will let or underlet said premises, or assign this lease without the written assent of the lessor first had and obtained thereto, except that said lessee may sublet space in the said premises to departments selling other lines of merchandise than those offered for sale by the lessee that is to say women's coats, suits, furs, and dresses".

The insertion of this provision in the lease completly stultifies any argument that the parties didn't have in mind that sub-lessees might occupy portions of the demised premises, because, after first inserting a blanket prohibition against sub-letting without the lessor's assent, an exception to the prohibition was agreed upon, and specific authority granted to defendant to sub-let portions of the premises to sub-lessees who handled lines of merchandise non-competitive to those handled by defendant.

The provision was in every respect a normal one, and certainly not one to be viewed with suspicion, nor even strictly construed; but one entitled to liberal construction consonant with the obvious intent of the parties. The defendant at that time was engaged in the business of selling women's coats, suits, furs and dresses. We must assume that both parties were interested in a long term lease. Lessor wanted as rentals 3% of the lessees' sale, but further wanted to be protected to the extent of minimum annual rental of $2,940.00. In addition the parties further recongnized that by the adding of additional lines of women's wear, non-competitive with those handled by the defendant, defendant's sales of its own merchandise might well be enhanced to the benefit of both lessor and lessee. In other words, by having sub-lessees handling, as became the case, women's hats and shoes, customers who entered the premises for the purpose of buying hats or shoes became immediately potential customers for coats, suits, furs and dresses.

An examination of the sales figures representing defendant's sales volume demonstrates the foresight

of the parties in this connection. During 1939 (ten and one half months) defendants sales were $43,952.12. A full twelve months on this basis would have meant total sales of $50,232.00. Six per cent of this figure is roughly- $3,000.00 in rentals, approximating the $2, 940.00 minimum rental the lessor demanded. But note how the sales increased in succeeding years:

1940	$ 57,044.05
1941	75,984.43
1942	123,550.52
1943	177,184.01
1944	180,134.12
1945	188,732.61
1946	146,619,52
1947	142,655.38
1948	149,843.28

In other words, from the low volume realized during the first year, defendant's sales increased to a peak of $188,732.61 during the war year of 1945, and even during the last full year of the lease amounted to approximately three times the sales volume of the first year.

When thus analyzed, plaintiffs' entire argument falls, and their authorities are demonstrated to be not in point. This isn't a case where sub-letting authority was used by the lessee to "reduce" rentals; or to "diminish the rent"; or by "changing the character of the business"; or by failing to "conform to its previous methods"; or by effecting "a change in the nature of the business"; or "to dismember its business". (Pages 24 to 33 of Plaintiffs' brief).

On the contrary, if the subletting had any effect at all, it is obvious that it enhanced, rather than reduced, defendant's sales volume, to the distinct benefit, rather than detriment, of the lessor and her daughters, these plaintiffs. And so, whether the relationship that the lessee bore to the lessor was *sui generis,* or quasi-fiduciary, as urged by plaintiffs, or simply the ordinary landlord and tenant relationship that we understand ordinarily exists under lease agreements, the defendant rendered to plaintiffs and to the lessor the full measure of its responsibilities. The parties agreed that the lessee might sub-let to sub-lessees handling non-competitive lines, and it is not suggested that it did more. The parties agreed that the percentage rentals were to be paid on the basis of the defendant's sales, and they were. Had the parties intended that percentage rentals were to be paid by the lessee on the sales by sub-lessees, a well as on its own, certainly they would have so provided in the lease.

The lease is in no wise ambiguous. It fixes in clear and concise language the basis upon which the percentage rentals were to be paid, namely, on the "total sales volume of the lessee". To construe it to require the lessee to pay rentals on some other basis is to do violence to the plain language of the written instrument, and to the obvious intent of the parties thereto.

We submit that the applicable rule and the only rule to be applied to this case is as set out in 17 C. J. S. 695, as follows:

> "The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where unambiguous,

are conclusive, and the rule making the terms of the contract conclusive where unambiguous is controlling in the absence of averment and proof of mistake, the question being, not what intention may have existed in the minds of the parties, but what intention is expressed by the language used.

In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. Where the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention.

Each contract must be construed according to its own terms or tenor, and the language employed must be construed with reference to the context and to the facts of the particular case.

It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for denying enforcement, to enforcing or giving effect to the contract as made, that is, to enforce or give effect to the contract as made without regard to its wisdom or folly, to the apparent unreasonableness of the terms, or to the fact that the rights of the parties are not carefully guarded, as the court cannot supply

material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract."

In numerous Utah decisions this rule has been applied and adhered to. In the case of *Middleton v. Evans et al,* 86 Utah 396, 45 P2d 570 is this stated:

> "It is a well-established rule of law that where the language of a contract is clear and unambiguous, it is the duty of the court to determine the intent of the parties from the language used by the parties in the contract. Wintle v. Utah-Idaho Sugar Company, 73 Utah 215, 273 P. 312; Armstrong v. Larsen, 55 Utah 347, 186 P. 97; Manti City Sav. Bank, v. Peterson, 33 Utah 209, 83 P. 566, 126 Am. St. Rep. 817."

And in *Wintle v. Utah-Idaho Sugar Company,* 73 Utah 215, 273 P. 312:

> "It, of course, is conceded that it is the duty of a court to determine the intent of the parties to a contract from the language used in the contract, if such language is clear and unambiguous."

And in *Murphy v. Salt Lake City,* 65 Utah 295, 236 P. 680:

> "Contracts are prepared and entered into for the convenience and protection of the parties, and unless waived the courts are bound to enforce them *in accordance with the intention as the same is manifested by the language used by the parties to the contract.*"

And in *Richards Irrigation Company v. Westview Irrigation C. et al,* 96 Utah 403, 80 P. 2d 458:

> "To this holding we cannot accede. Both sides invoke the settled doctrine that when a writing is clear and plain on its face, not ambiguous or doubtful, there is no room for construction but resort must be had to the language employed in determining meaning or intention. The rule is a sound one and fully applicable to the disputed clauses in the agreement here in question. The language employed is not doubtful or ambiguous; the meaning and intent are conspicuously clear and plain."

And in *First National Bank of Salt Lake City v. Haymond et al,* 89 Utah 151, 57 P. 2d 1401:

> "Morever, to require the mortgagee to accept the mortgaged property in lieu of the money which the mortgagors have agreed to pay *would be to make a contract for the parties contrary to their agreement.*"

And in the case of *Jensen v. Kidman et al,* 85 Utah 27, 38 P. 2d 303, this court quoted with approved the rule as stated in 13 C. J. 525:

> "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly, as the court cannot supply material stipulations or read into the contract words which it does not contain."

The rule so quoted by this court, in the case last above cited, is of particular significance, as it is the contract of the original parties which is to be construed herein, and not some agreement which these plaintiffs, as successors to the original lessor, deem should

have been made. Significant, indeed, is the fact that the lessor herself, Allie C. Baker, never raised the question now raised by these plaintiffs, and it was only after her death, in fact several years after these plaintiffs succeeded to her interests, that any contention was made that rentals were not being paid in accord with the provisions of the lease. But more about that later.

B. ASSUMING THAT THE RENTAL PROVISIONS OF THE LEASE ARE AMBIGUOUS, THE PARTIES THEMSELVES ADOPTED A CONSTRUCTION THEREOF WHICH MAY NOT BE ABROGATED.

The Plaintiffs have gone to considerable extent in their brief in arguing applicable rules of construction where an ambiguity is found in a written instrument. Such rules have no relevancy, however, where the language of the instrument, as here, is clear, consise and unequivocal. But we now assume, for the purpose of the argument that despite such clear, concise and unequivocal language, this court finds that an ambiguity does exist, and the terms of the lease require construction. What construction shall be given? The parties themselves have construed the lease as fixing defendant's obligation to pay percentage rentals on the basis of its sales only, which construction by the parties we submit should not be disturbed. This is referred to by the authorities as the doctrine of "practical construction".

A general statement of the rule is to be found in 12 Am. Jur., (Contracts), Section 249, Page 787, as follows:

"In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms. In fact the courts will generally follow such practical interpretation of a doubtful contract. It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation reflects that meaning than when subsequent differences have impelled them to resort to law and one of them seeks an interpretation at variance with their practical interpretation of its provisions. Where the language of a contract is uncertain and the parties thereto, by their subsequent acts and conducts, have shown that they construed it alike and within the purview of the constructions permitted as possible by such language, the courts will ordinarily follow such adopted construction as the correct one.

The facts in this case bring it squarely within the above rule. The contract provided for the payment by lessee of annual rental equivalent to ~~six~~ three (3%) per cent of its total sales volume, but not less than $2,940.00. It is apparent that for the years 1939, 1940, 1941, 1942,

1943 and 1944 no percentage rentals were paid at the conclusion of each respective year, but only the basic annual rental of $2,940.00. This appears from the stipulation embodied in the pre-trial order wherein it is reflected that the first percentage rentals over and above the basic rentals were paid on May 21, 1945, and covered the additional rentals predicated on the percentage basis for the years 1939 through 1944. The amount of this payment on May 21, 1945, was in the amount of $3,997.08. (Par. 5 (b) of Pre-Trial Order, R. - 021).

Why the additional rentals computed on the percentage basis for each of the years 1939 through 1943 had not previously been paid, is not made to appear, but in any event, at the conclusion of the year 1944 this over-sight was rectified by the payment on May 21, 1945, of all accruals through 1944, and the payment of such accurals, based on 3% *of the defendant's sales only,* was accepted by these plaintiffs. This is reflected by Plaintiffs' Exhibit "D" being a letter from the defendant to the plaintiffs which accompanied defendant's check for the additional percentage rentals for the period 1939 through 1944 in the amount of $3,997.08. The letter is as follows:

WRIGHT'S INCORPORATED

Women's Apparrel and Accessories
Ogden, Utah

New York Office
450 Seventh Ave.

Chicago Office
222 West Adams St.

May 21, 1945

Mrs. Etha B. Flowers
Mrs. Aura B. Horton
Mrs. Tulie B. Randall
2206 Lincoln Avenue
Ogden, Utah

Dear Madames:

Following is a summary of the sales of "Wright's Inc." for the period ended December 1944.

Total sales $661,236.00
Of the total sales the lease provides the lessor shall receive three per cent, accordingly. A total rental due for the period is $19,837.08
Less rentals paid, 6 years at $2,940.00 15,840.00

Additional rental due $3,997.08.

Accordingly our check in this amount is enclosed.

Made payable to the three heirs indicated above.

Yours very truly
WRIGHT'S INCORPORATED
By C. A. WRIGHT, President

CAW;ml

Thus it is apparent that in 1945, when the first computation of rentals on the percentage basis was made, that these plaintiffs knew that defendant was computing them on the basis of its sales only, and that plaintiffs accepted the rentals on that basis.

Now let's see what happened in succeeding years. On January 14, 1946, defendant sent plaintiff its check in the amount of $2,721.97, representing the difference between three (3%) per cent of its sales for the year

1945, and the basic rental of $2,940.00 for that year. A letter accompanied such payment (Plaintiffs' Exhibit "E") as follows:

January 14, 1946

Mrs. Etha B. Flowers
Mrs. Aura B. Horton
Mrs. Tulie B. Randall
2206 Lincoln Avenue
Ogden, Utah

Dear Madames:

Following is a summary of the sales of "Wright's Inc." for the period ending December of 1945. The total sales is $188,732.60.

Of the total sales the lease provides the lessor shall receive three per cent, accordingly. A total rental due for the period is $5,661.97

Less rentals paid for one year 2,940.00

Additional rental due $2,721.97

Accordingly our check in this amount is enclosed.

Made payable to the three heirs indicated above.

Sincerely yours

WRIGHT'S INCORPORATED

By H. L. Yeagers, Vice President

HLY: ml

Now as to 1946. It appears from Paragraph 5 (d) of the stipulation embodied in the Pre-trial Order that on February 17, 1947, defendant paid to plaintiffs $1,358.59, as additional percentage rentals due for 1946. The letter, if any, which accompanied this payment is not in evidence, but on February 20, 1947, apparently

in response to some inquiry by one of the plaintiffs, defendant wrote to Etha B. Flowers, one of the plaintiffs, a letter received in evidence as Plaintiffs' Exhibit "F", which opened with the following statement:

> "Pursuant to your telephone call I have examined the record of sales and payments at Wright's Incorporated and find as follows:

Then followed some detail with respect to sales figures, but the significant factor is that it was tied specifically to sales by the defendant.

On January 27 1948, defendant paid to plaintiffs as additional percentage rentals for the year 1947, the sum of $1341.70. This payment was accompanied by a letter from defendant, as follows:

WRIGHT'S INCORPORATED

Women's Apparel and Accessories

Ogden, Utah

Chicago Office	New York Office
222 West Adams St.	450 Seventh Ave.

January 27, 1948

Mrs. Etha B. Flowers
1378 Marilyn Drive
Ogden, Utah

Dear Mrs. Flowers:

Enclosed is the summary of the totals for the year of 1947.

Total Sales year 1947	$142,723.21
3% of above	4,281.70
Rent Paid 1947	2,940.00
Balance	$ 1.341.70

Enclosed is the check for the balance.

Yours very truly,

H. L. Yeager
Vice President

On January 31, 1949, defendant made a payment to plaintiffs in the amount of $1,555.30 as the additional percentage rentals for the year 1948. This payment was accompanied by defendant's letter as follows:

January 31, 1949

Mrs. Etha B. Flowers
1378 Marilyn Drive
Ogden. Utah

Dear Mrs. Flowers:

Following is a report of the sales of Wright's Inc. for the period ended December 31, 1948:

Gross Sales		$149,843.28
Rent Computed at 3%		4,495.30
Less Rents paid 12 months (a) $245.		2,940.00
Balance Rent Due	$	1,555.30

Accordingly our check for the balance due is enclosed.

Yours truly,
WRIGHT'S INC.
C. A. Wright
President

CW:me
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Bear in mind that when this payment was made and this letter written, *it was just fifteen days before*

the expiration of the term of the lease, and represented payment in full for the last full year of the lease. This letter, as the previous ones did, made plain that the payment was predicated on the basis of 3% of defendant's sales only. As in the case of previous payments, this payment on that basis was accepted without question by the plaintiffs.

We submit that these several payments, and the several letters which accompanied the percentage rental checks established beyond doubt that defendant construed its obligation to plaintiffs to be the payment of percentage rental on the basis of its sales, and not on the basis of its sales plus sub-lessees' sales, and that plaintiffs, by accepting payments on that basis, knowing such to be the construction placed on the lease by defendant, acquiesced therein, and cannot now be heard to say that some other construction should be adopted.

A review of a few of the decisions should serve to illustrate the point.

The case of *Chick et al v. MacBain,* (Va) 160 S. E. 214, involved the rental clause of a lease. The court said:

> "We are further of opinion that the language in clause 11 of the lease, supra, is ambiguous, and that when the original term provided for by the lease expired and appellants paid the rent pursuant to the provisions of the lease, as construed by them, and without protest appellee accepted the payments for a period of three months, he acquiesced in the construction that appellants were to pay the sum of $235 per month for the first thirty months of the second term of five

years and $275 per month for the last thirty months of the second term. It is a well-recognized principle of law that, when a written instrument is capable of more than one construction, then the courts will give to it that construction which the parties themselves have placed upon it. This is known as "the doctrine of practical construction."

In Holland v. Vaughan, 120 Va. 328, 91 S. E. 122, 124, Chief Justice Prentis said: "No rule for the construction of written instruments is better settled than that which attaches great weight to the construction put upon the instrument by the parties themselves. * * *"

In Chesapeak & Potomac Tel. Co. v. Wythe Mut. Tel. Co., 142 Va. 540, 129 S. E. 389, the rule stated in the Holland Case was applied. It is true that in the Chesapeake & Potomac Tel. Co. Case the period of acquiescence extended over three years. The period of time, however, is not the criterion. *The test comes when a party to the contract is asserting a right under the contract as he conceives it. If the other party to the contract controverts the assertion of the right, he should do so immediately.*

Under a proviso in the lease the lessor was given the option of changing the terms of the lease by giving six months' notice to such intention. No such notice was given.

In view of the fact that no notice was given that appellee would contend that the future rental would be at the rate of $275 per month, and in view of the further fact that appellants relied for a period of three months upon their construction of the contract that the rental should be at the rate of $235 per month for the first thirty

months, without protest upon the part of the appellee, it is a fair assumption that all parties to the contract placed the same construction upon it."

We deem it sufficient to add to the foregoing what we believe to be the latest pronouncement by this court on the subject. In *Trucker Sales Corporation v. Potter,* 104 Utah, 137 P. (2) 370, it is held:

> "On the other hand, the court's construction is that given the contract by the parties themselves. From October 1, 1938, when the contract was entered into, until August, 1941, almost three years, the partnership furnished plaintiff with duplicate slips and paid without question plaintiff's commission on all coal sold. Appellants first raised this question on October 6, 1941. Nothing could show the intention of the parties more clearly than the interpretation they themselves placed upon a contract. It is well settled in this state that where the parties to a contract, with full knowledge of the terms thereof, by their actions before any controversy has arisen, place upon it a construction which is not contrary to the usual meaning of the language used the courts will follow that construction. Fowers v. Lawson, 56 Utah 420, 191 P. 227; Roberts v. Tuttle, 36 Utah 614, 105 P. 916; Titton v. Sterling Coal & Coke Co., 28 Utah 173, 77 P. 758; 107 Am. St. Rep. 689; Snyder v. Fidelity Savings Association, 23 Utah 291, 64 P. 870; Woodward v. Edmonds, 20 Utah 118, 57 P. 858; Peay v. Salt Lake City, 11 Utah 331, 40 P. 206.

In the instant case the defendant at all times construed the lease as requiring it to pay rental on the basis of its sales only, and it did so pay. With each

payment of percentage rentals the plaintiffs were advised that the payment was on that basis. Plaintiffs accepted the payments so computed, even up to and including those for the final year of the lease, without protest or objection of any kind. We sumbit that under such circumstances, and at the conclusion of the tenancy, plaintiffs may not now contend it to have been the intention of their predecessor and this defendant that payment was to have been on some other basis.

Assuming, therefor, for the sake of the argument, that the provisions of the lease relating to rental payments are ambiguous, such provisions have been construed by the parties themselves as fixing rentals on the basis of defendant's sales only, and that construction, under the decisions of this court, is now final.

It may not be amiss at this point to observe that in the construction of lease agreements, as contra distinguished from contracts generally, a rule of construction of ambiguities against the lessor and in favor of the lessee, has been adopted. This rule of construction springs from the fact that a lease is regarded as a grant of the lessor, and so should be construed most strongly against him. Like all rules of construction, other factors may supply modifying effects, but the rule does have its place where lease agreements are under consideration. In the case of Anderson v. Ferguson, (Wash.) 135 P. (2) 302, the rule is thus expressed:

> "The convenant is at least capable of two constructions, but any ambiguity therein must be resolved in favor of the lessees, for it is well settled that where a lease is capable of more than one construction, the courts will adopt that con-

struction which is most favorable to the lessee. Salzer v. Manfredi, 114 Wash. 666, 195 P. 1046; Diettrich v. J. J. Newberry Co., 172 Wash. 18, 19 P. 2d 115; National Bank of Commerce of Seattle v. Dunn, 194 Wash. 472, 78 P. 2d 535; Murray v. Odman, 1 Wash. 2d 481, 96 P. 2d 489.

In *Teeter v. Mid-West Enterprise Co.* (Okla.) 52 P. (2) 810, thus:

> "It is a well-settled rule of law that where a provision in a lease contract is ambiguous, and where there is no evidence to the contrary as to the intention of the parties, it should be construed against the lessors and in favor of the lessees. Salzer v. Manfredi, 114 Wash. 666, 195 P. 1046; Pierce et al v. New York Dock Co. (C.C.A.) 265 F. 148; Goldberg v. Pearl, 306 Ill. 436, 138 N. E. 141; 507 Madison Avenue Realty Co., Inc., v. Martin, 114 Misc. 315, 187 N.Y.S. 318; and Williams v. Notopolis, 259 PPa. 469, 103 A. 290.

In *Boh v. Pan American Petroleum Corporation* (La) 37 F. Supp., 785, thus:

> "In any event the most that can be said is that the language of the lease is of doubtful meaning and as was said in a syllabus in the case of Murrell v. Lion, 30 La. Ann. 255, which was cited with approval in the case of Martin v. Martin, La. App. 181 So. 63: "Any doubt as to the intentions of the parties to a contract of lease, arising out of uncertain terms of the contract, will be construed in favor of the lessee. It is the business of the lessor to have the agreement expressed in clear and certain terms."

In *Thenunissen et al v. Huyler's, Inc.* 25 F. (2) 530, thus:

> "Plaintiffs concede that 'it has long been settled law that in the case of a lease or other

written instrument of grant, the document is to be construed most strongly in favor of the grantee or lessee,' and such is the law."

APPELLANT'S CASES

Plaintiffs cite a number of decisions of other courts relating to percentage rental agreements in support of their appeal. We desire to comment briefly thereon, because we believe that an examination thereof discloses either that they are not in point at all, or that they support defendant's position, rather than plaintiffs'.

First, however, we should observe that if other decisions relating to other lease agreements are to be turned to it must be, (1) on the premise that this lease is ambiguous, and so should be construed in accord with constructions placed on other ambiguous documents, without regard to the construction the parties themselves placed thereon, (which, as we have shown, is at variance with Utah law); or (2) on the premise the parties could not lawfully contract as they did, and the court should construe the instrument as it feels the parties should have written it. The first we have already discussed and demonstrated its lack of merit. Further, the danger to be encountered in attempting to apply formulas to the construction of contracts which are clear and unambiguous is apparent. These dangers were recognized by the Court of Appeals of New York in the case of *Brown v. Bedell, et al,* 188 N. E. 641 in the following language:

> "The court should be solicitous to gather the object and purposes of the parties from the language of their contract rather than from formulas applied to other cases."

The second premise is untenable on its face. These parties were free to contract as they saw fit. The lessor could have given the defendant occupancy rent free had she seen fit. She could have charged a flat rental, or she could, as she did, combine a basic rental with a percentage of defendant's sales. She might, had she seen fit, tied the percentage rentals into all sales from the premises, which would have included sales by sub-lessees, or she might have based the percentage rentals on all of defendant's receipts from the premises, which would have included rentals received by defendant from sub-lessees, but not their sales. Or she might, as she did, elect to fix the rentals on the basis of defendant's sales, without regard to other receipts by defendant, or sales by sub-lessees. We submit that in so doing she did nothing immoral, or unlawful, or contrary to public policy. She herself was satisfied with her lease and with the anticipated rentals thereunder. While her daughters may not now be satisfied with the lease as she made it, such dissatisfaction certainly is no basis for abrogating it.

Now to plaintiffs' case relating to percentage rental agreements. The first one cited is that of *Garden Suburbs Golf & Country Club v. Pruitt* (Fla.) 24 So. (2) 989. The excerpt quoted therefrom by plaintiffs appears at Page 21 of their brief, and is as follows:

> "A percentage lease permitting the lessee to sublet portions of the premises, or concessions, or privileges therein, does not permit the lessee to deprive the lessor of a percentage of the gross receipts which would accrue from main revenue-producing facilities. *In other words, this subleasing authority cannot be used to reduce the*

percentage rental which would ordinarily accrue to the lessor from the revenue-producing facilities ordinarily operated by the lessees." (Italics ours)

The final sentence of the quotation contains the key, and discloses its inapplicability to the facts of the instant case. Here the sub-lessees did not operate facilities "ordinarily operated by the lessee", and so could not "reduce the percentage rental which would ordinarily accrue to the lessor."

In *Cissna Loan Co. v. Barron,* (Wash.) 270 P. 1022 (Page 25 of Plaintiffs' brief), the percentage rentals were based on the gross sales of the department store business conducted in the building. The lessee moved two important departments into adjoining premises, and thus sought to avoid payment of rentals on sales therefrom. As pointed out by plaintiffs, the Washington court refused to approve such a course of conduct as would have the effect of reducing the rentals "which would ordinarily accrue to the lessor". That again is a far cry from the principle of this case, where the lessee, instead of reducing its sales, enhanced them greatly by subletting for sales of merchandise non-competitive with its own.

The rule announced by the New Jersey Court in the case of *S. P. Dunham Co. v. East State Street Development Co.,* 35 A (2) 40, 49, (Pages 26 and 27 of Plaintiffs' brief), is likewise not in point. That rule is as follows:

> "The construction of the provisions of the lease here expressed is not to be understood to condone the removal by the claimant of its most lucrative and remunerative departments from the

demised premises to other premises in the endeavor to diminish the rent to which the defendant is justly entitled under the covenants of the lease.

In *Selber Bros. v. Newstadt's Shoe Stores* (La.) 194 So. 579, the lessee changed the character of its business from that of a high class shoe store to that of a low order of business, consisting of continuous close out sales, cheap brands of shoes, etc. This case obviously is not in point.

The significance of the cited case of *Mayfair Operating Corp. v. Bessemer Properties* (Fla.) 7 So. (2) 342, (Page 29 of Plaintiffs' Brief), is not apparent to us, as it appears not to be in point at all. However, at Page 30 of the brief is a statement we cannot permit to go unchallenged.

Plaintiffs there argue that the parties to this lease contemplated the defendant would sell "female wearing apparel *and all accessories and accouterments.*" This we categorically deny, as by the terms of the lease the defendant at most was obligated to continue its then operations of selling women's coats, suits, furs and dresses. As to other "accessories and accouterments" it was given carte blanche sub-letting authority.

Next follows a dissertation on the meaning of total sales, and the distinction between sub-lessees as such and sub-lessees of space. As to the meaning of total sales, we have no quarrel, so long as it is confined to defendant's sales, as the lease confines it. We do deny, however, that the language of the lease "total sales of the lessee" may be extended to include sales by persons other than the lessee, without doing violence to the

obvious intentions of those who themselves chose the language used. Further we do not agree with plaintiffs' assertion (Page 36 of their brief) that the words "total sales volume of the lessee" possess such "an all inclusive quality, without limitations" as to bring in sales of anyone but the lessee.

As to the distinction attempted between "sublessees" and "sub-lessees of space", we confess to losing ourselves. Apparently, however, plaintiffs contend that inasmuch as the sublessees were "sublessees of space" they in fact were not sub-lessees at all, and hence their sales are not sales by sub-lessees, but in fact sales by the defendant.

Of course the first answer to this is the stipulation of facts hereinbefore referred to. In such stipulation the sales are specifically distinguished—defendant's sales being agreed as being in the amount of $1,300,926.57; the sales of the sub-lessee selling shoes being $822,620.09; and the sales of the sub-lessee selling millinery being $131,330.73. What the argument seeks to do is to repudiate such stipulation, and throw the sales of the sub-lessees into the category of sales by the defendant.

Further than that, however, we cannot conceive that this court will consent to a violation of the obvious intent of the parties to the lease, as specifically expressed in their written agreement, by holding that the subletting authority was in fact no such authority at all.

The words seized upon by plaintiffs, in this phase of their argument, appear to be the phrase in the lease that the lessee might "sublet space in the said premises" for sales of non-competitive lines of merchandise, which

follows as an exception to the provision that the sub-lessee may not sublet without the lessor's consent. The entire paragraph of the lease reads as follows:

> "That neither the lessee nor its legal representative will let or sublet said premises or assign this lease, without the written consent of the lessor first had and obtained, except that said lessee may sublet space in the said premises to departments selling other lines of merchandise than those offered for sale by the lessee; that is to say, women's coats, suits, furs, and dresses."

From this provision of the lease plaintiffs make what is to us the anomalous argument,

> *"The parties clearly intended that the defendant could not place a sub-tenant in the demised premises, whether that sub-tenant occupied all of the premises or only a part thereof."* (Bottom of Page 30 of Plaintiffs' Brief).

How that conclusion can be draw from the foregoing language of the lease is beyond us. Plaintiffs explain it by saying that as there is a prohibition against sub-letting generally, with an exception only in favor of sub-lessees of space in the premises, a sub-lessee of space is not a sub-lessee of any portion of the premises. Or to be concrete, one who might sublet the space constituting the rear one-half of the premises, with the right to occupy and use such space, is actually not sub-letting anything. To this we pose the question, what then can constitute a sub-letting? All the lessee had to sub-let was space. Certainly a sub-tenant would not be interested in sub-letting any portion of the building itself, as contra-distinguished from space in the building. We submit that it is obvious that the parties to this lease,

in using the phraseology they did, used words in their ordinary sense, and in providing that the lessee might sub-let space in the premises for sales of non-competitive lines of merchandise, intended just that, and contemplated that any such sub-letting would constitute the sub-lessee a sub-tenant.

To hold otherwise is to attribute to the parties the senselessness of inserting in the lease a meaningless provision. To construe the general prohibition against sub-letting as being all controlling is to render wholly ineffective the exception. If, as contended by plaintiffs, the lessee could not sub-let, but only operate separate departments under its own direction and control, and which constituted a part of lessee's business as a whole (page 33 of Plaintiffs' Brief), the exception to the general prohibition is meaningless. In other words, if all lessee could do was to install new departments and operate them itself as a portion of its over all operations, then the provision

> "except that said lessee may sublet space in the said premises to departments selling other lines of merchandise than those offered for sale by the lessee, that is to say, women's coats, suits, furs and dresses."

is wholly meaningless, because there is certainly nothing in the general prohibition against sub-letting to preclude the lessee from enlarging its own operations at will. This excepting clause was obviously inserted to the end of modifying the general prohibition against sub-letting without lessor's consent, and constituted authority to defendant to sub-let without first obtaining permission,

where sales of non-competitive merchandise were concerned. To hold that it was written into the lease solely for the purpose

> "of permitting the operation by others of departments under defendants' control." (Page 31 of Plaintiffs' Brief)

is to say that the lessee had no such authority but for the proviso. But the general prohibition is directed wholly against sub-letting, not against the enlargement of defendant's operations, and thus, if so construed, renders entirely meaningless the excepting clause. As pointed out by this court in the case of *Powerline Company v. Russell's Inc.* 103 Utah 441, 135 P. (2) 906,

> "When possible the court should give effect to all words and clauses of the lease and construe the lease as a whole."

The only way in which this excepting clause can be given any effect or meaning whatever is to attribute to it the effect of modifying the clause containing the general prohibition against sub-letting, and when so construed its effect is to permit a sub-letting of space in the leased premises to persons selling lines of merchandise not sold by defendant.

As pointed out by this court in the case of *Vitagraph Inc. v. American Theatre Co.* 77 Utah 71, 291 P. 303:

> "Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect

> must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions."

And in *Bd. of Ed. of Salt Lake City v. Wright-Osborn Co.*, 49 Utah 453, 164 P. 1033, it is said:

> "It is a cardinal rule of construction that all the words used by the parties must, if possible, be given their usual and ordinary meaning and effect. It will not be assumed that the parties to the contract did not intend what their language implies."

Also *Bonneville Lumber Co. v. J. G. Peppard Seed Co.*, 72 Utah 463, 271 P. 226:

> "It is a cardinal rule of construction, and the first to be applied whenever construction becomes necessary, that, unless technical terms are used, the language must be given its plain, ordinary, and obvious meaning."

CONCLUSION

We respectfully submit, that all rulings of the lower court upon the trial of this action were proper and correct. That with respect to plaintiffs' proffered evidence the court was correct in rejecting it.

First, because it was directed toward the proof of facts in direct conflict with the written stipulation of the parties fixing the dollar amount of defendant's sales, and establishing that there were in fact sub- lessees having substantial sales of their own; such stipulation specifically reciting that the facts therein agreed upon were "for the purpose of this action"; and

Second, because by plaintiffs own statement in open court to the effect that defendant was liable regardless of whose sales they were, the proffered evidence was immaterial.

That with respect to the lower court's granting defendant's motion for non-suit, such ruling was correct and proper,

First, because the lease by its specific and unambiguous terms fixed the liability of the defendant to pay rentals on the basis of its own sales only, and it was agreed that all such rentals had been paid; and

Second, the parties themselves, throughout the entire term of the lease, had paid and accepted rentals based on defendant's sales only, which constituted a practical construction of the rental provisions of the lease, and one to be adopted and accepted by the court.

Respectfully submitted,

HOWELL, STINE & OLMSTEAD,

Attorneys for Defendant and Respondent